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January 19, 2006

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Federal Communications Commission
Office of Secretary

Re: MB Docket 05-192

Dear Ms. Dortch:

Time Warner Inc. ("Time Warner") and Comcast Corporation ("Comcast") (collectively, the "Submitting Parties" or "Companies") hereby respond to DIRECTV, Inc.'s ("DIRECTV") January 17, 2006 letter¹ regarding the Submitting Parties' response to DIRECTV's request for relief filed in MB Docket 05-192. DIRECTV continues to seek an electronic copy of all confidential and highly confidential spreadsheets submitted in response to the December 5, 2005 letters from Donna C. Gregg, Media Bureau Chief, transmitting a request for certain information and documents (the "Information and Document Request")² related to the transactions involving Time Warner, Comcast, and Adelphia Communications Corporation that are the subject of the Consolidated Application for Authority to Transfer Control in MB Docket 05-192, including copies of materials the Submitting Parties have designated as "Copying Prohibited."

As explained in the Submitting Parties' January 12, 2006 letter filed in this docket (the "January 12th Letter"), the materials at issue contain some of the Submitting Parties' most sensitive business data that they maintain in the strictest of confidence.³ Accordingly, pursuant

¹ See Letter from William M. Wiltshire, counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket 05-192 (filed Jan. 17, 2006) ("DIRECTV Letter").

² See Letter from Donna C. Gregg, Chief, Media Bureau, to Steven N. Teplitz and Susan A. Mort, Time Warner Inc., MB Docket 05-192 (Dec. 5, 2005); Letter from Donna C. Gregg, Chief, Media Bureau, to Joseph W. Waz, Jr., and James R. Coltharp, Comcast Corporation, MB Docket 05-192 (Dec. 5, 2005).

³ See Letter from James R. Coltharp, Comcast Corporation, and Steven N. Teplitz, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket 05-192, p. 1-2 (filed Jan. 12, 2006) ("January 12th Letter"). For example, the confidential and highly confidential materials include: 1) detailed financial data, such as per subscriber revenue figures for both Companies; 2) calculations of incremental, marginal and variable/fixed costs (with respect to Comcast) and Variable Margins and Operating Income Before Depreciation and Amortization (with respect to Time Warner); 3) video programming network data that would reveal to competitors the terms

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to the Protective Order and Second Protective Order adopted in this proceeding (collectively, the "Protective Orders"), the Submitting Parties have designated such materials as "Copying Prohibited."⁴ As with DIRECTV's original request for relief (the "DIRECTV Request"),⁵ the DIRECTV Letter fails to provide any justification for release of an electronic version of these confidential and highly confidential documents on terms different from those to which Time Warner, Comcast, and the Commission already have agreed, and thus, the request for relief should be denied. To reiterate, in our January 12th Letter, the Companies offered to allow DIRECTV's outside consultants to view documents that have been designated "Copying Prohibited" pursuant to the Protective Orders on computers connected to network servers at the offices of the Companies' respective outside counsel, as well as to load their own software onto the computers to analyze the confidential and highly confidential data contained in those documents.⁶

Our January 12th Letter demonstrated that the arguments asserted in support of the DIRECTV Request serve only to detract attention from the real issues. At no time was DIRECTV told that their consultants' review of electronic documents would be confined to a "laptop" computer, and the suggestion that News Corp., one of the world's largest media companies, might not be able to afford off-site software licenses was entirely lacking in credibility. DIRECTV now concedes that the issue has never been "about computing power" and no longer claims that it would be impossible to obtain off-site software licenses, only that it would be time-consuming and inefficient to do so.⁷

Now that the Submitting Parties have demonstrated that the grounds recited in the DIRECTV Request are baseless; the DIRECTV Letter now raises a new alleged impediment -- one DIRECTV has never bothered to raise directly with the Companies -- that its outside consultants may need to analyze the Submitting Parties' confidential and highly confidential data simultaneously.⁸ In yet another effort to address DIRECTV's concerns, Comcast and Time Warner are willing to accommodate simultaneous analysis of all the data at either the offices of Wiley Rein & Fielding L.L.P. or Fleischman and Walsh, L.L.P., depending on where DIRECTV's outside consultants prefer to perform such simultaneous analysis (consequently, the consultants will then require only one additional off-site software license). To the extent any

conditions, and pricing structure under which the Submitting Parties buy and sell programming; and 4) data regarding the terms of the Companies' sports programming contracts, such as distribution rights, subscribership, revenues and other proprietary data that competitors could use to determine the Submitting Parties' negotiating strategies. *Id.*

⁴ See Appendix A to Order Adopting Protective Order, MB Docket 05-192, DA 05-1673, ¶ 6 (rel. June 16, 2005); Appendix A to Order, MB Docket 05-192, DA 05-3226, ¶ 7 (rel. Dec. 21, 2005).

⁵ See Letter from William M. Wiltshire, counsel for DIRECTV, Inc., to Donna C. Gregg, Chief, Media Bureau, MB Docket 05-192 (filed Jan. 10, 2006) ("DIRECTV Request").

⁶ See January 12th Letter at 1-3, 5-6.

⁷ See DIRECTV Letter at 2-3.

⁸ See *id.* at 2.

problems arise in obtaining off-site software licenses, arranging for sufficient computer terminals, or any similar logistical matters, the Companies pledge to work cooperatively with DIRECTV to achieve a satisfactory resolution.⁹ DIRECTV's outside consultants also will be permitted to print out the various plots, graphs, tables, and charts resulting from their analyses for purposes of examination and taking notes, which, in turn, should supply them with ample information to present to the Commission regarding their findings.¹⁰

Significantly, DIRECTV does not dispute that serious econometric analysis can occur under the Submitting Parties' proposed arrangement; only that such analysis may be less efficient and more time-consuming.¹¹ The additional accommodations the Submitting Parties agree to in this letter will further reduce any inconvenience to DIRECTV's outside consultants and, at any rate, inconvenience to DIRECTV does not outweigh the Submitting Parties' overriding interest in protecting their highly sensitive business and financial data in the manner contemplated by the Protective Orders.

DIRECTV's claim that the document examination procedures adopted in the News Corp./Hughes and EchoStar/Hughes merger proceedings somehow provide a basis for the more convenient review and analysis DIRECTV desires is without merit.¹² In the protective orders issued in those proceedings, the Commission specifically excepted certain subscriber data from the "Copying Prohibited" designation, while granting absolute discretion for all other confidential materials to be marked "Copying Prohibited."¹³ Thus, the submitting parties in

⁹ For example, once we know the specific software involved, one of the Companies or one of the outside law firms may already hold licenses allowing use by guests.

¹⁰ As we pointed out in our January 12th Letter, each time DIRECTV runs an analysis of the Submitting Parties' confidential data, it is, in effect, making a copy of the data in some form. Printouts of such analyses are copies of the data in yet another form. While the Submitting Parties will permit DIRECTV's outside consultants to print out and examine the results of their analyses at the offices of outside counsel for purposes of making notes to take with them, we simply cannot allow DIRECTV's outside consultants to leave the premises with graphical representations (copies) of the data that it admits will be "preserved for comparison and other analysis." See January 12th Letter at 6, n. 17 (citing DIRECTV Request at 2).

¹¹ See DIRECTV Letter at 2-3.

¹² See *id.* at 4; see also Appendix C to Order, MB Docket 03-124, DA 03-2376 (rel. July 22, 2003); Appendix C to Order, CS Docket 01-348, DA 02-964 (rel. Apr. 25, 2002).

¹³ See Appendix A to Order, MB Docket 03-124, DA 03-2376, ¶ 7 (rel. July 22, 2003) ("News Corp./Hughes Protective Order"); Appendix A to Order, CS Docket 01-348, DA 02-964, ¶ 7 (rel. Apr. 25, 2002) ("EchoStar/Hughes Protective Order"). Both protective orders provided that: "If, in the judgment of an Applicant, a document (but not including the Subscriber Data) contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend 'Copying Prohibited,' and no copies of such document, in any form, shall be made. The Subscriber Data shall be subject to the restrictions set forth in Appendix C hereto." *Id.* The orders defined Subscriber Data as "information concerning subscribers on a zip code and designated market area basis, or similar basis, stored in electronic format." News Corp./Hughes

those transactions were on express notice that they could not designate the subscriber data at issue as "Copying Prohibited," and that interested parties could obtain electronic copies of such data.

In the Protective Orders issued in this proceeding, however, the Commission did not place *any* limitations on the Submitting Parties as to which data they could designate as "Copying Prohibited," but rather left such designations to the sound discretion of the Submitting Parties, just as it had done in the Verizon/MCI and SBC/AT&T protective orders referenced in our January 12th Letter.¹⁴ Thus, DIRECTV has failed in its effort to distinguish the recent Commission decision confirming that, absent express exceptions on the face of the applicable protective order, designation of confidential material as "Copying Prohibited" is appropriately left to the discretion of the submitting party.¹⁵ Stated another way, DIRECTV's attempt to use the News Corp./Hughes and EchoStar/Hughes proceedings to support its arguments here fail because those proceedings involved copies of materials that were not marked "Copying Prohibited," while here the issue involves copies of materials that are marked "Copying Prohibited."

Affording a high level of confidentiality protection (including broad discretion to designate as "Copying Prohibited") to these competitively sensitive materials -- including information clearly exempt from public disclosure under the Freedom of Information Act¹⁶ -- is consistent with clear and long-established Commission policy. As stated succinctly on the face of the protective orders cited by DIRECTV: "without [an enhanced] level of protection the Applicants (and other parties) might be unwilling to submit such sensitive materials to the Bureau."¹⁷ The Commission is appropriately concerned with safeguarding its ability to obtain information from parties, and has specifically addressed the issue in the context of an information and document request issued in a transfer of control proceeding before the Commission. In the TCI Satellite Entertainment/Primestar merger, the Commission denied EchoStar Communications Corporation's (a direct competitor) request to use confidential information in a manner conflicting with the terms of the protective order, finding that "without the stringent limitations on the use of the materials submitted pursuant to the terms of the protective order, Primestar may not have voluntarily submitted the documents they assert to be

Protective Order at ¶ 2; EchoStar/Hughes Protective Order at ¶ 2. Importantly, the Commission still permitted the parties discretion as to whether to designate other competitively sensitive data, such as "materials related to [the parties'] programming contracts and retransmission consent agreements with multichannel video programming distributors," "Copying Prohibited." *See, e.g.,* News Corp./Hughes Protective Order at ¶ 2.

¹⁴ *See* January 12th Letter at 3-4.

¹⁵ *See Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-184, n. 54 (2005) ("Verizon/MCI Order").

¹⁶ Exemption 4 of the Freedom of Information Act protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See* 5 U.S.C. §552(b)(4).

¹⁷ *See* News Corp./Hughes Protective Order at ¶ 3; EchoStar/Hughes Protective Order at ¶ 3.

confidential.”¹⁸ In its decision, the Commission restated its position that “given the critical importance of the Protective Order in facilitating prompt access to voluminous materials, many of which undoubtedly could be withheld from public inspection under Exemption 4 of the Freedom of Information Act, we believe that a waiver should be granted only in extraordinary circumstances...”¹⁹ Any inconvenience to DIRECTV under the Submitting Parties’ proposed procedures for review and analysis of its competitively sensitive confidential and highly confidential data hardly amounts to “extraordinary circumstances” that would necessitate release of an electronic copy of such data.

In the News Corp./Hughes and EchoStar/Hughes merger proceedings, the submitting parties provided the requested subscriber data with the advance knowledge and understanding, plainly articulated in the applicable protective orders, that such information could not be designated as “Copying Prohibited,” and thus, electronic copies would be available to interested parties under the procedures specified in those protective orders. Here, however, as with the protective orders in the Verizon/MCI and SBC/AT&T proceedings, no limitations were imposed on the discretion of submitting parties to designate confidential materials as “Copying Prohibited.” Thus, consistent with the Commission’s finding in the Verizon/MCI Order, DIRECTV’s request must be denied.²⁰ If DIRECTV had desired to seek restrictions on designating certain materials as “Copying Prohibited,” as was the case in its own merger, it could have done so after the Information and Document Request was issued in this proceeding on December 5, 2005 and before the Second Protective Order was adopted on December 21, 2005, *i.e.*, before those highly confidential materials were submitted to the Commission.

In sum, the Submitting Parties would like to reiterate three points. First, DIRECTV has made no effort to identify the specific data claimed to be “necessary” for its outside consultants or provide any justification for why such information should not be entitled to the “Copying Prohibited” protection established in the Commission’s Protective Orders.²¹ Second, the

¹⁸ See *TCI Satellite Entertainment, Inc. and Primestar, Inc.; for Consent to Transfer Control of Tempo Satellite, Inc. and MCI Telecommunications Corporation and Primestar LHC Inc.; for Consent to Assignment of Direct Broadcast Satellite Authorizations*, Order, 14 FCC Rcd 2715, ¶ 6 (1998).

¹⁹ See *id.* (citing *Applications of Craig O. McCaw and American Telephone and Telegraph Co. for Consent to Transfer of Control of McCaw Cellular Communications, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 5836, ¶ 167 (1994)).

²⁰ See Verizon/MCI Order at n. 54.

²¹ Indeed, DIRECTV has not made any showing that would come close to satisfying the Commission’s high threshold test for disclosure of confidential financial information. In considering whether disclosure of such data is warranted, “the Commission will not authorize the disclosure... on the mere chance that it might be helpful but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.” See *Classical Radio for Connecticut, Inc., and WTIC-FM Listeners’ Guild on Request for Inspection of Records*, 69 F.C.C.2d 1517, n.4 (1978) (citing *Applications of Eider C. Stangland and Wallace L. Stangland, d/b/a Sioux Empire Broadcasting Co.*, 10 F.C.C.2d 132 (1967)). See also 47 C.F.R. § 0.461(c).

Submitting Parties' legitimate right to protect their most sensitive commercial data clearly outweighs any "inconvenience" to DIRECTV's outside consultants.²² Third, despite the plain language of the Protective Orders and the weakness of DIRECTV's arguments, the Submitting Parties have previously made accommodations to DIRECTV's outside consultants and in this letter make further accommodations that fully satisfy any concerns DIRECTV has raised.

For all of the foregoing reasons, and for the reasons stated in the Submitting Parties' January 12th Letter, DIRECTV's request to abrogate the protections of the Protective Order and Second Protective Order should be denied.

Respectfully submitted,

Comcast Corporation

By: /s/ James R. Coltharp
James R. Coltharp
Comcast Corporation

Time Warner Inc.

By: /s/ Steven N. Teplitz
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²² Furthermore, the Submitting Parties are now even more apprehensive of the possibility of a breach of confidentiality in disclosure of their sensitive business and financial data due to DIRECTV's recent announcement that it has joined forces with numerous other parties -- most of whom have not signed Acknowledgments of Confidentiality -- in the effort to delay realization of the many benefits to consumers from the instant transactions. *See Jonathan Make, Adelphia Deal Opposition Grows as Pay TV Group Seeks Conditions*, COMMUNICATIONS DAILY, Jan. 18, 2006, p. 1-2.